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IN THE

Supreme Court of the United States

October Term, 1948.

PATRICK J. DELAHANTY and CATHERINE C. DELAHANTY, individually and trading as P. J. DELAHANTY MANUFACTURING CO.,
Petitioners,

vs.

JOHN J. DALEY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY, AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

October Term, 1948.

PATRICK J. DELAHANTY and CATHERINE C. DELAHANTY, individually and trading as P. J. DELAHANTY MANUFACTURING CO.,

Petitioners,

vs.

JOHN J. DALEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Patrick J. Delahanty and Catherine C. Delahanty, individually and trading as P. J. Delahanty Manufacturing Co., respectfully pray for a writ of certiorari to the Supreme Court of New Jersey to review a decision of that Court entered on March 7, 1949, affirming a judgment of the former Supreme Court, Essex County Circuit of the State of New Jersey.

Summary and Statement of the Matters Involved.

On or about December 18, 1944, respondent, John J. Daley was hired by Patrick J. Delahanty and Catherine C. Delahanty, his wife, as a manager of sales and design (R. 20). His employment related to services and products furnished by petitioners under a master contract with a procurement agency of the United States Government (R. 38-40). On December 9, 1944, the Treasury Department approved an annual salary of $6,000.00 and disapproved a proposed additional bonus of $3,000.00 for this position (R. 30, 63). The respondent terminated his employment on July 5, 1947 (R. 62). He then sued in the (Old) Supreme Court of New Jersey and recovered the sum of $1500.00 upon the second count in his complaint (R. 18). Herein he alleged that he was to have received an annual salary of $7500.00 for his services during the year 1946, $6,000.00 by way of weekly salary and an additional $1500.00 in monthly installments and that he was paid the $6,000.00 but not the $1500.00 (R. 4-9). The petitioners denied the employment contract for $7500.00 and alleged as a separate defense that the contract violated the Wage Stabilization Act (U. S. C. A. 50:961 etc.) and the rules, regulations and decisions made thereunder by the National Wage Stabilization Board and the Salary Stabilization Unit (R. 10-14). Respondent offered no proof at the trial of Treasury Department approval of salary in excess of $6,000.00. He did offer evidence, over objection, in an attempt to prove that the Wage Stabilization Act was not applicable (R. 45-46). The trial court submitted the case to the jury as a simple question of fact without referring in any way to the Wage Stabilization Act (R. 48-49). Petitioners appealed to the Supreme Court of New Jersey alleging trial errors of the court (R. 2-3) in refusing to nonsuit (R. 25-26), in admitting the aforesaid evidence and in failing to charge upon the

applicability of the act. The Supreme Court of New Jersey affirmed the judgment and held that the trial court was not to be expected to charge the federal statutory law and executive orders in the absence of a request to charge. This court further stated that it was not satisfied that the Stabilization Act and executive orders relied on by petitioners were applicable to the facts as developed at the trial (20).

Questions Presented.

1. Whether an agreement to pay the respondent $1500.00 in excess of the amount of annual compensation approved by the Treasury Department acting under the authority of U. S. C. A. 50:961, etc., is a valid and enforceable contract under federal law?

2. Was the burden of proof on the respondent to prove that the salary claimed by him under his alleged 1946 contract with the petitioners had been approved by the Treasury Department of the United States under the Wage Stabilization Act (U. S. C. A. 50:961, etc.)?

3. Was the trial court bound to charge the jury with respect to the aforesaid statute, and the rules, regulations and decisions made thereunder as the fundamental law of the case even though the petitioners made no request to the court for such charge?

4. Could the respondent question the applicability of the aforesaid Act, regulations and decisions made thereunder in an action for wages when the Treasury Department had disapproved such an increase?

Reasons for the Allowance of the Writ.

1. The trial court erred in not holding that any agreement to pay an amount in excess of that approved by the Treasury Department of the United States was invalid and unenforceable by virtue of federal law and the Supreme Court of New Jersey erred in not reversing the trial court on that ground.

2. The trial court erred in not having placed the burden on the respondent to prove that the salary claimed by him had been approved by the Treasury Department of the United States, and the Supreme Court of New Jersey erred in not having reversed the trial court on that ground.

3. The trial court erred in not charging the jury with respect to the aforesaid statute, and rules, regulations and decisions made thereunder as the fundamental law of this case even though the petitioners did not make any request for such charges and the Supreme Court of New Jersey erred in not reversing the trial court on that ground.

4. The trial court erred in admitting evidence of the prevailing wage rates of engineers in the area, thereby overruling the decision of the Treasury Department that the respondent's contract was subject to the aforesaid Act and the rules, regulations and decisions made thereunder, and the Supreme Court of New Jersey erred in not having reversed the trial court on that ground.

Wherefore your petitioners pray that a writ of certiorari issue to the Supreme Court of New Jersey, commanding said court to certify and send to this court, on a date to be designated, a transcript of the record of all the proceedings of said Supreme Court of New Jersey had in this

cause, to the end that this cause may be reviewed and determined by this Court; that the judgment and order of the former New Jersey Supreme Court for the Essex Circuit and the judgment of the Supreme Court of New Jersey be reversed, and your petitioners have such other and further relief in the premises as to this court may seem just.

Dated: May 23, 1949.

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Hackensack, New Jersey.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

PATRICK J. DELAHANTY and CATHERINE C. DELAHANTY, individually and trading as P. J. DELAHANTY MANUFACTURING CO.,

Petitioners,

against

JOHN J. DALEY,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the Supreme Court of New Jersey written by Chief Justice Vanderbilt is printed in the appendix and is reported in 64 Atlantic Reporter 2nd 340. This opinion affirmed a judgment of the former Supreme Court of New Jersey, Essex County Circuit entered June 25, 1948, which is printed in the appendix to Brief of Defendants-Appellants (pages 18-19).

Statement as to Basis of Jurisdiction.

Jurisdiction of the Supreme Court of the United States is invoked under Section 1257 (3) of Title 28 of the United States Code, for a writ of certiorari to the Supreme Court

of New Jersey, which is the highest court of that state, to review the final judgment in this case, made on March 7, 1949.

There is drawn into question the construction and effect given to the United States Constitution and federal laws which were raised by the petitioners at the trial and on appeal. Section 965 of the Wage Stablization Act (50 U. S. C. A. 965), provides:

> "No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act. The President shall also prescribe the extent to which any wage or salary made in contravention of such regulations shall be disregarded by the executive departments and other governmental agencies in determining the cost or expenses of any employer for the purposes of any other law or regulation."

Section 4001.4 of the regulations of the Stabilization Director approved August 28, 1943, (8 F. R. 11960) provides in substance that a determination by the Commissioner of Internal Revenue was made conclusive for the purpose of determining costs or any expenses under any contract made by or on behalf of the United States and final and not subject to review by the Tax Court of the United States or by any Court in any civil proceeding.

By its final judgment and decision the Supreme Court of New Jersey held: (1) that the petitioners had the burden of showing that no approval for the proposed increase had been obtained in affirming the trial judge's refusal to nonsuit the respondent when he admitted no approval was obtained (R. 23-25).

(2) That the respondent could attack the decision of the Commissioner of Internal Revenue disapproving a salary in excess of $6,000.00 annually in a civil proceeding by the admission of evidence to show the Act was not applicable.

(3) That there existed no duty on the part of the trial Court to charge the jury with respect to the statute and the rules, regulations and decisions made thereunder which constituted the fundamental law of the case in violation of Article 6, Section 2 of the Constitution of the United States, which provides that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

(4) That the contract in question was not invalid as contrary to the public policy of the United States.

The defense of the petitioners based on the aforesaid statute and regulations asserted a right and immunity under a statute of the United States and therefore brings the case within the jurisdiction of the Supreme Court of the United States by virtue of the holding in *Nutt v. Knut*, (1905) 200 U. S. 12, 26 Sup. Ct. 216, 50 L. ed. 348. It was also held by the Supreme Court of the United States in *Grand River Dam Authority v. Grand-Hydro*, (1948) 335 U. S. 358, that the duty of that Court to consider the question arising under the federal law exists even though the State Court purported to rest its decision largely on state law.

Statement of the Case.

A summary and statement of the case is set forth in the petition.

Specification of Errors to be Urged.

1. The trial court erred in not holding that any agreement to pay an amount in excess of that approved by the Treasury Department of the United States was invalid and unenforceable by virtue of federal law and the Supreme Court of New Jersey erred in not reversing the trial court on that ground.

2. The trial court erred in not having placed the burden on the respondent to prove that the salary claimed by him had been approved by the Treasury Department of the United States, and the Supreme Court of New Jersey erred in not having reversed the trial court on that ground.

3. The trial court erred in not charging the jury with respect to the aforesaid statute, and rules, regulations and decisions made thereunder as the fundamental law of this case even though the petitioners did not make any request for such charges and the Supreme Court of New Jersey erred in not reversing the trial court on that ground.

4. The trial court erred in admitting evidence of the prevailing wage rates of engineers in the area, thereby overruling the decision of the Treasury Department that the respondent's contract was subject to the aforesaid Act and the rules, regulations and decisions made thereunder, and the Supreme Court of New Jersey erred in not having reversed the trial court on that ground.

ARGUMENT.

POINT I.

The Trial Court erred by not holding that any agreement to pay an amount in excess of that approved by the Treasury Department of the United States was invalid and unenforceable by virtue of Federal Law.

The Stabilization Act of 1942, (50 U. S. C. A. 961), effective on October 2, 1942, gave the President of the United States authority to issue a general order stabilizing * * *

> "wages and salaries as far as practicable on the basis of levels existing on September 15, 1942."

Pursuant to authority contained in Section 962 of the Act, the President issued Executive Order No. 9250 (7 F. R. 7871), on October 3, 1942, which, as amended on September 25, 1943, provided in paragraph 5 of Title II that no increase in salaries in excess of $5,000.00 per year should be granted unless otherwise determined by the Director of Economic Stabilization (20).

On December 2, 1942, the Director ordered all salaries frozen as of October 3, 1942, and further provided that no increase in salaries could be made without obtaining the approval of the Commissioner of Internal Revenue, to whom the Director had already, by regulations issued on October 27, 1942, delegated jurisdiction over all salaries in excess of $5,000.00 per annum, and salaries regardless of amount, for persons employed in a *bona fide* administrative, executive, or professional capacity (7 F. R. 10050) (21). By virtue of the power thus delegated, the Commissioner on October 27, 1942, established a Stabilization Unit within the Bureau of Internal Revenue (7 F. R. 8748). These controls continued without substantial change until the issuance of Executive Order No. 9599 (10 F. R. 10155),

on August 17, 1945 (20). This order liberalized, but did not entirely remove controls. Paragraph 1 of Title IV of the order provided that salary increases could not be granted without approval in the case of products or services being furnished under contract with a federal procurement agency if costs to the United States were increased. Controls were again restored on February 14, 1946, by Executive Order No. 9697 (11 F. R. 1691) (20) and continued until terminated on November 12, 1946, by Executive Order No. 9801 (11 F. R. 13435) (21).

Section 965 of the Stabilization Act provides:

> "No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act."

In *Wernhardt, et al. v. Koenig, et al.*, 60 F. Supp. 709 (D. C. Pa. 1945), the Court held that

> "this section makes plain the intent of Congress that such contracts are illegal and the Court cannot and will not lend itself to the enforcement of a contract made to perform an act which is expressly forbidden by a law of the United States and arises from an illegal contract. Such a contract is not only unenforceable, but void. Fitzsimmons v. Eagle Brewing Co. (C. C. A. 3rd 1939) 107 F. 2d 712, 126 A. L. R. 681."

In considering the effect of the act and the regulations made pursuant thereto on a suit for wages, Justice Shientag of the Supreme Court of New York had this to say in the case of *Kells v. Boutross*, 53 N. Y. S. 2d 734 (Sup. Ct. N. Y. 1945):

> "Any agreement for an unapproved increase in wages is illegal; it is contrary to public policy and is not enforceable in the Courts. Those consequences are implicit from the very nature of the statute and the orders issued thereunder. Denial of the relief is in direct conformity with the requirements of public policy, and is a most appropriate individual punishment for violation. The employee is not deprived of his right to sue

> for the amount of his former wage. He cannot come into Court, however, and recover the amount of the unlawful increase. To permit him to do so would in effect amount to judicial sanction for the commission of what is made a criminal offense."

See also *In Re: Pringle Engineering and Mfg. Co.*, 164 F. 2d 299 (C. C. A. 7th 1947) where a salary request was approved but no action was taken on a bonus request. The Court held that the lifting of controls in August, 1945, could not give legal existence to the bonus even though approval in that case was no longer required.

In the proceedings before the Supreme Court of New Jersey, the respondent relied on the case of *Thacker v. American Foundry* (D. Ct. of App. Calif. 1947) 177 P. 2d 322. However, in that case, the employers had deliberately neglected and failed to seek or obtain the authority of the Treasury Department to pay the wages provided in the contract. Such action on their part was tantamount to an estoppel to take advantage of the federal statute. It is also to be noted that the judgment for the plaintiff was reversed on another ground and a new trial ordered.

In connection with the contract of employment with the respondent for the year 1945, the petitioners were ordered to show cause why they should not be penalized for overpayments. With knowledge of this warning and that the act and regulations applied to such contracts in their organization, the petitioners refused to pay the respondent any increase or bonus. This obedience to federal law resulted in this litigation and finally in the decision of the Supreme Court of New Jersey, holding the petitioners liable on an illegal contract. The effect of this decision is to punish the petitioners for their obedience to the law. And it also permits the respondent, who had full knowledge of the Treasury disapproval, to recover a bonus in direct contravention of the public policy of the United States.

The Constitution and the laws enacted thereunder cannot be the Supreme law of the land if a trial court is able to eliminate the issue of the federal law from the case whether it be by express ruling or by an obvious disregard of it.

POINT II.

The Court below erred in not placing the burden on the respondent to prove that the salary claimed by him had been approved by the Treasury Department of the United States.

At the trial the petitioners moved for nonsuit (R. 25, 26), on the grounds that the respondent by his own evidence had established the fact that the proposed increase had not been approved by the Treasury Department. The Court in denying this motion ruled that whether approval had not been given was a matter of defense and in effect, that the respondent did not have the burden of showing such approval.

The answer of the petitioners denied the contract of employment which under New Jersey law placed upon the plaintiff the burden of proving a legal agreement.

In the case of *Gionti v. Crown Motor Freight Co.* (Ct. of E. & A. 1942) 128 N. J. L. 407 26 A. 2d 282, Justice Perskie speaking for the former New Jersey Court of Errors and Appeals said:

> "Defendant in its answer, as we have seen, denied the existence of the contract and denied the sufficiency of the complaint in law. Such defenses squarely placed the burden upon the plaintiff to prove a valid and legal contract. Ziegener & Lane v. Daeche, 91 N. J. L. 634; 103 Atl. Rep. 82. Cf. Barnes v. P. & D. Manufacturing Co., 117 N. J. L. 156; 187 Atl. Rep. 186; Spiccia v. Paterson Silk Throwing Co., 127 N. J. L.

509; 23 Atl. Rep. (2d) 251. This the plaintiff did not do, and could not have done because, as we have found, the pleaded contract was void and unenforceable. Hence our determination is that it was error to deny the motion for nonsuit and to direct a verdict."

Similarly in *Bradley v. American Radiator,* (C. C. A. 2d 1947) 159 F. 2d 39, in an action for the recovery of a commission fee which was contingent on the securing of a war contract, the Court held that the plaintiff had the burden of showing a legal contract by bringing himself within the exception of Executive Order No. 9001 (issued under authority of 50 U. S. C. A. § 611), which prohibited the employment of solicitors on a contingent fee basis except bona fide selling agents maintained by the manufacturer. The Court in that case held the alleged contract void as against public policy.

At no time did the respondent show or offer proof of approval of the alleged $7500.00 salary for 1946. The evidence is clear that no such approval was ever obtained. Having failed in this respect, the alleged contract violated public policy and is void.

POINT III.

The lower Court erred in not charging the jury with respect to the aforesaid statute and the rules and regulations made thereunder, as the fundamental law of this case even though the petitioners did not make any request for such charge.

In charging the jury, the Court made absolutely no reference to the Act and the regulations, rules and decisions made thereunder, to which the petitioners took exception and made known their reasons thereof (R. 48-50).

It is primarily the duty of the trial court to see that the jury is properly charged with respect to the law applicable to the facts which they may find from the evidence presented. *Hoffman v. Trenton Times,* (Ct. of E. & A. 1940) 125 N. J. L. 450, 16 A. 2d 814. And where evidence submitted pertains to a specific defense, the Court has a duty to explain the law governing that defense to the jury even though no request therefor was made. Absence of a request does not relieve the Court from its duty to charge the jury on the fundamental law of the case. In the case of *Sunderland v. Payne,* (C. C. A. 6th 1921) 274 F. 360, the Court said:

> "Aside from any request to charge on any phase of the case, it is the duty of the trial court to submit to the jury all the issues joined by the pleadings, if any substantial evidence was offered in proof of such issues by the party upon whom the burden rests to establish the affirmative thereof."

Such is also the rule in New Jersey. In ordering a new trial, Justice Minturn speaking for the former Supreme Court in the case of *Lambert v. Trenton and Mercer Traction Corp.* (Sup. Ct. 1926) 103 N. J. L. 23, 135 A. 270, affirmed, (Ct. of E. & A. 1927) 104 N. J. L. 175, 139 A. 718, said:

> "Counsel, therefore, might properly assume that the basic rules regulating the quantum of damages recoverable by each plaintiff would receive the attention of the court as an essential portion of its charge, without suggestion from counsel, and acting upon that assumption be prepared for nothing further than to enter an exception to such portion of the charge as should fail to meet the legal requisites, as conceived by counsel. When, therefore, the court entirely omitted from its charge a statement of the fundamental rule of law governing the assessment of damages by the jury, no other practicable course would seem to have been open to counsel than the one he adopted

of calling the court's attention to the omission, and requesting a statement to the jury of the law upon the subject. We think that in the exigency, the learned trial court, realizing the omission, should have detained the jury sufficiently to state to them the rule of law governing the subject, or, as an alternative, if deemed necessary, should have requested counsel to reduce his request in writing and submit it for the court's consideration before final submission of the case to the jury. Dunne v. Jersey City Gal. Co., 73 N. J. L. 586; Benz v. Central Railroad Co., 82 Id 197."

See also:

Benz v. Central R. R. of N. J. (Sup. Ct. 1912) 82 N. J. L. 197 at p. 198, 82 A. 431 affirmed 83 N. J. L. 780, 85 A. 1134.

Rowland v. Wunderlick, (Sup. Ct. 1934) 113 N. J. L. 223, 174 A. 168.

Kruscka v. Konvitz, (Sup. Ct. 1935) 13 N. J. Misc. 299, 177 A. 839.

Hartwyk v. Shea, (Sup. Ct. 1935) 114 N. J. L. 235, 176 A. 390.

Furthermore it is settled that in cases involving the validity of contracts which offend public policy in violation of federal statutes, the Courts have an independent duty to consider the question of validity on their own motion which cannot be waived by the parties even though the defense of illegality is not interposed. *Noonan v. Gilbert,* (D. C. Ct. of App. 1934) 68 F. 2d 775, *Westwood v. Continental Can Co.,* (C. C. A. 5th 1935) 80 F. 2d 494, *Fitzsimmons v. Eagle Brewing Co.,* (C. C. A. 3rd 1939) 107 F. 2d 712. The petitioners throughout the case repeatedly advanced the theory that the act and the regulations etc. made thereunder were controlling. The act and the regulations from the very outset of the case were before the Court in the petitioners' answer to the respondent's com-

plaint (R-12); were the subject of questions to witnesses (R-24, 25, 27, 29, 30, 34, 35, 36, 38, 42, and 43); were in exhibits submitted in evidence (R-32, 33, 45); were in arguments of counsel (R-25, 35, 36, 40); were in comments by the Court (R-30, 39, 40, 44 and 47); and the Court specifically stated it was bound by the Act and that it would take judicial notice of the Act (R-40, 41).

It is difficult to perceive what further action could have been taken by the petitioners' counsel under the circumstances. In accord with custom and the usual practice, he relied on the trial court to charge the jury on the fundamental law pertinent to the facts adduced in the defense of the action; certainly the trial court, by its statements from the bench, gave counsel every reason to believe that the federal law would not be disregarded. Having found that the court had overlooked such matters in the charge, counsel then took an exception and made known the reasons therefor.

That the omitted charges concerned "an involved Federal Statute with several complicated executive orders", (to use phraseology to be found in the opinion of the Supreme Court of New Jersey), constitutes no valid reason or excuse of the trial court's having disregarded such statute and orders when they were so clearly applicable to the case being tried. Complicated or not, the federal statute and the executive orders constituted the fundamental law of the case, and the jury could not render a proper verdict without adequate instructions.

The duty of the trial court, in a case such as this one where the defense was based on federal law, was greater than in the ordinary action, for, under the provisions of Clause 2 of Article 6 of the Constitution of the United States, a federal statute made in pursuance of the Con-

stitution is the supreme law of the land, and "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

It is respectfully submitted that the court had an affirmative duty to charge the jury on the aforesaid statute and regulations even in the absence of a request by the petitioners and a duty in the absence of proof by the respondent of showing approval of the alleged salary by the Treasury Department to rule that such agreement was void and unenforceable on the Court's own motion.

POINT IV.

The Trial Court erred in admitting evidence of the prevailing wage rates of engineers in the area and the Supreme Court of New Jersey erred in not reversing the Trial Court on that ground.

At the trial, the court permitted the respondent to show over the petitioners' objection that salaries for engineers in the same area were commensurate with that which the respondent was seeking. The respondent's theory was that the Act and regulations were not applicable and that the question of salary approval was outside the scope of the Act. However, the Treasury Department expressly disapproved any salary in excess of $6000.00 annually and notified the petitioners to show cause why they should not be punished for over payments of which the respondent had full knowledge. These official and authorized determinations by the Commissioner of Internal Revenue under authority of the Act are by virtue of Sec. 4001.4 of the regulations of the Stabilization Director (8 F. R. 11960) conclusive and final and not subject to review by the Tax

Court of the United States or by any Court in any civil proceeding. Despite full knowledge, access to the petitioners' files, and ample opportunity, the respondent never directly raised the issue that the Act, etc. was not applicable with the Commissioner of Internal Revenue. (R. 33, 34, 35, 38, 41, 42 and 43.) But rather, he satisfied himself with a collateral attack on the applicability of the Act and the decisions made thereunder, which is expressly prohibited.

The petitioners had not merely the right but the duty to obey the decisions of the Commissioner under threat of a penalty. It is respectfully submitted that in allowing such evidence, the trial court permitted the respondent to contravene the Act and the regulations made thereunder.

CONCLUSION.

For the foregoing reasons, Petitioners respectfully pray that the Petition for a Writ of Certiorari herein may be granted.

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APPENDIX.

1. Opinion of the Supreme Court of New Jersey (bound with the brief) (P 23)

2. Executive Order No. 9250 (7 F. R. 7871), October 3, 1942, Title II, Sec. 5,

   "No increases in salaries now in excess of $5,000 per year (except in instances in which an individual has been assigned to more difficult or responsible work), shall be granted until otherwise determined by the Director".

3. Executive Order No. 9599 (10 F. R. 10155), August 17, 1945, Title IV, Sec. 1,

   "The National War Labor Board and such other agencies as may be designated by the Director of Economic Stabilization with the approval of the Director of War Mobilization and Reconversion are authorized to provide that employers may, through collective bargaining with duly certified or recognized representatives of the employees involved, or, if there is no such representative, by voluntary action, make wage or salary increases without the necessity of obtaining approval therefor, upon the condition that such increases will not be used in whole or in part as the basis for seeking an increase in price ceilings or for resisting otherwise justifiable reductions in price ceilings or, in the case of products or services being furnished under contract with a federal procurement agency, will not increase the costs to the United States."

4. Executive Order No. 9697 (11 F. R. 1691) February 14, 1946,

   "By virtue of the authority vested in me by the Constitution and statutes of the United States and particularly by the First War Powers Act of 1941, the Second War Powers Act of 1942, as amended, and the Stabilization Act of 1942, as amended, and for the purpose of maintaining the stabilization of the economy in the present emergency, it is hereby ordered:

"1. For the duration of the existing emergency, all departments and agencies of the Government shall, in any matter affecting the stabilization of the economy in which they have discretion in the use of their powers, exercise such discretion in such manner as will best promote the continued stabilization of the economy."

5. Executive Order No. 9801 (11 F. R. 13435) November 12, 1946,

"By virtue of the authority vested in me by the Constitution and statutes of the United States, and particularly by the Stabilization Act of 1942, as amended and for the purpose of further effecting an orderly transition from war to a peace-time economy, it is hereby ordered as follows:

All controls heretofore in effect stabilizing wages and salaries pursuant to the provisions of the Stabilization Act of 1942, as amended, including any Executive order or regulation issued thereunder, are hereby terminated; except that as to offenses committed, or rights or liabilities incurred, prior to the date hereof, the provisions of such Executive orders and regulations shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability or offense."

6. Regulations of the Commissioner of Internal Revenue (Treasury Decision 5186; 7 F. R. 10050) Sec. 1002.13, December 3, 1942,

"Section 1 of the Act provides in effect that salaries, so far as practicable, shall be stabilized at the levels which existed on September 15, 1942. In the case of a salary rate of $5,000 or less per annum existing on October 27, 1942, or established thereafter in compliance with these regulations, and in the case of a salary rate of more than $5,000 per annum existing on October 3, 1942, or established thereafter in compliance with these regulations, no increase shall be made by the employer, except as provided in § 1002.14, without prior approval of such increase by the Commissioner * * *"

7. Regulations of the Director of the Wage Stabilization Unit, August 28, 1943 (8 F. R. 11960) Sec. 4001.4.

"* * * Any such determination by the Commissioner, made under such regulations, that a payment is in contravention of the Act, or any rulings or regulations promulgated thereunder, shall be conclusive upon all executive departments and agencies of the Government in determining the costs or expenses of any employer for the purpose of any law or regulations, either heretofore or hereafter enacted or promulgated, including the Emergency Price Control Act of 1942 or any maximum price regulation thereof, or for the purpose of calculating deductions under the revenue laws of the United States, or for the purpose of determining costs or expenses under any contract made by or on behalf of the United States. Any determination of the Commissioner made pursuant to the authority conferred on him shall be final and shall not be subject to review by the Tax Court of the United States or by any court in any civil proceedings. No increase in a salary rate approved by the Commissioner shall increase the level of production costs appreciably or furnish the basis either to increase prices or to resist otherwise justifiable reductions in prices or furnish the basis of further wage or salary increases."

8. Treasury Decision 5506 (11 F. R. 4083),

"(a) Any salary increase which, prior to February 14, 1946, was approved or lawfully made without approval. A salary increase will, for purposes of this paragraph, be deemed lawfully made without approval prior to February 14, 1946 where there was a firm agreement or a definite commitment by the employer before such date to put a salary increase into effect and such increase was actually put into effect prior to March 15, 1946.

SUPREME COURT OF NEW JERSEY

No. A243, September Term, 1948

JOHN J. DALEY,
Plaintiff-Respondent,
vs.
PATRICK J. DELAHANTY and CATHERINE C. DELAHANTY, individually and trading as P. J. DELAHANTY MANUFACTURING CO.,
Defendants-Appellants.

Argued September 14, 1948; decided MARCH 7, 1949.

On appeal from the former Supreme Court, Essex County.

Mr. Milton T. Lasher argued the cause for the appellants.

Mr. William Gelfond argued the cause for respondents, (Messrs. Dultz, Miller, Gelfond & Zeller, attorneys).

The opinion of the Court was delivered by

VANDERBILT, *C. J.*:

This is an appeal by the defendants from a judgment of the former Supreme Court, Essex County Circuit, awarding damages of $1,500 with interest and costs, to the plaintiff.

The plaintiff entered into a contract of employment with the defendants in December, 1944, under the terms of which he was to be paid $6,000 annually in weekly payments and an additional $3,000 annually in monthly installments of

$250.00, the salary arrangement to be subject to the approval of the Wage Stabilization Unit or the Wage Stabilization Board of the Treasury Department of the United States. The plaintiff commenced his employment and was paid the weekly salary as well as the monthly salary pending the disposition of the application made by the defendants to the Federal authorities. In June, 1945, the defendants were notified that a salary greater than $6,000 would not be approved and were instructed to cease the payment of the $250.00 monthly. Thus for the year 1945, the plaintiff received a total of $7,500, $6,000 by way of weekly salary and an additional $1,500 made up of monthly payments of $250.00 each for a period of six months.

The plaintiff testified that in January, 1946, the parties made an agreement whereby the plaintiff was to receive the sum of $7,500 base salary for the year 1946. There is no proof that any application was made to or permission received from the Federal authorities for the payment of this $7500 salary. The plaintiff actually received from the defendants for the year 1946 only $6,000.

The plaintiff's complaint contained three counts. The first count was for the balance of the $9,000 salary, plus an alleged bonus of ten per cent, for the year 1945. The second count was founded on the alleged agreement for a salary of $7,500 plus a ten per cent bonus, for the year 1946. The third count was for a bonus of ten per cent, of salary for the year 1947, but this count was later abandoned. At the trial the Court directed a verdict for the defendants on the first count, finding in effect that the parties had agreed to be bound by the action of the Wage Stabilization Board. The defendants denied the agreement alleged in the second count concerning the increase in salary for the year 1946. This issue the Court submitted to the jury as a simple question of fact and the jury

returned a verdict in favor of the plaintiff. It is from the judgment entered on this count that this appeal has been taken.

Although the defendants had pleaded in their answer as an affirmative defense the alleged illegality of the purported agreement covering the year 1946 and the court below conceded that it was required to take judicial notice of the Wage Stabilization Act and the regulations promulgated thereunder, the defendants did not move for a directed verdict on the ground that any increase in the 1945 base salary of $6,000 was illegal without the approval of the Wage Stabilization Board. Nor did they prior to the charge submit to the trial court any written request to charge the applicable law and executive orders with respect to their affirmative defense of illegality. Instead they contented themselves with an exception to the Court's charge "limiting the jury strictly to the factual issue of whether the defendant should pay the plaintiff the $1,500 for the year 1946, when the proof showed and the Stabilization Act provides together with the regulations established thereunder, that insofar as employers having a master contract with the Federal Government are concerned, approval of all wage increases must be obtained from the Wage Stabilization Board."

It is argued that without any requests to charge from the defendants the trial court should have charged the applicable law of the Stabilization Act and of the executive orders issued thereunder. It is insisted that it is the duty of the trial judge to charge the fundamental law of the case and *Rowland v. Wunderlick*, 113 N. J. L. 223 (Sup. Ct. 1934) and *Hartwyk v. Shea*, 114 N. J. L. 235 (Sup. Ct. 1935) are cited to us. But in these two cases counsel did not content themselves with taking an exception, as here, to the alleged omission to charge part of the basic law of

the case, but requested the trial court to give appropriate instructions to the jury. Not only must a distinction be made between merely taking an exception to a charge as given and requesting the Court to charge the jury further, but there is a further difference between the two cited cases and the case at bar. In the cited cases the trial court was concerned with fundamental rules of the common law which are or should be known to all triers of fact in the courts of law; here an involved Federal statute with several complicated executive orders issued pursuant thereto were being relied on by the defendants. The trial judge is not to be expected to charge such Federal statutory law and executive orders in the absence of a request to charge presented in writing in advance of the summation of counsel. Nor are we at all satisfied that the Stabilization Act and the Executive orders relied on by the defendants are applicable to the facts as developed at the trial.

The judgment is affirmed.

A True Copy

s/ CHARLES K. BARTON,
Clerk.

OPPOSITION

BRIEF

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JUN 25 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1948.

No. ~~812.~~ 81

PATRICK J. DELAHANTY and CATHERINE C. DELAHANTY, individually and trading as P. J. DELAHANTY MANUFACTURING CO.,
Petitioners,

vs.

JOHN J. DALEY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LIONEL P. KRISTELLER,
DULTZ, MILLER, GELFOND & ZELLER,
HERMAN E. DULTZ,
Counsel for Respondent.

BATAVIA TIMES, LAW PRINTERS,
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IN THE

Supreme Court of the United States

October Term, 1948.

No. 812.

PATRICK J. DELAHANTY and CATHERINE C. DELAHANTY, individually and trading as P. J. DELAHANTY MANUFACTURING CO.,

Petitioners,

vs.

JOHN J. DALEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Counter-Statement Concerning Jurisdiction.

The respondent respectfully submits that the petitioners in their pending application failed to show that the jurisdiction of the Supreme Court of the United States should be invoked. It is alleged on behalf of the petitioners that Section 1257 (3) of Title 28 of the United States Code is invoked to obtain the necessary jurisdictional requirement. Two grounds are advanced under this section: one, that there is drawn into question the construction and effect given to the United States Constitution and Federal Laws

which were raised by the petitioners at the trial and on appeal; secondly, that the defense of the petitioners asserted a right and immunity under a statute of the United States. The opinion of the Supreme Court of New Jersey as delivered by Chief Justice Vanderbilt of that Court did not decide any Federal question as nowheres in the opinion was the validity of the act and regulations relied upon by the petitioners assailed nor did the opinion rule upon a right or immunity claimed or asserted under the aforesaid statutes and regulations. The opinion of the Court simply held that since the petitioners did not move for a directed verdict nor did they, prior to the charge of the trial court, submit to that trial court any written Request to Charge that the trial court, therefore, was not to be expected to charge such statutory law and executive orders in the absence of a Request to Charge presented in writing in advance of summation of counsel. The failure of petitioners to so move for a directed verdict or to submit the required written Request to Charge were matters of practice and procedure of the State Court and dealt with the fundamental law of the local Court. The opinion of the Court was in conformity with and disposed of the grounds of appeal filed on behalf of the petitioners (R 2A and 3A). All the grounds of appeal dealt with matters of evidence or practice and procedure of the local Court. None of the grounds of appeal required a decision as to the validity, construction or effect of a Federal Statute or of the Constitution of the United States.

Counter-Argument.

It is respectfully urged that the petitioners' request for a Writ of Certiorari be denied for the following reasons:

1. The validity of the United States Constitution and Federal Laws was not drawn into question in the Supreme Court of New Jersey.

2. No right or immunity under a statute of the United States was decided by the Supreme Court of New Jersey.

3. The decision of the State Court decided local questions which are not subject to review by this court.

4. The Federal Statutes and Regulations relied upon by the petitioners herein were not applicable to the facts as developed at the trial.

The validity of the United States Constitution and Federal Laws was not drawn into question in the Supreme Court of New Jersey.

The petitioners appealed to the Supreme Court of New Jersey alleging trial errors of the court below in refusing to non-suit; in admitting evidence and in failing to charge the Wage Stabilization Act. These allegations of the petitioners were presented in conformity with the grounds of appeal filed with the New Jersey Supreme Court (R 2A and 3A). None of these grounds of appeal as advanced by these petitioners draw in question the validity of the United States Constitution or a Federal Statute. In order to raise a Federal question, it is necessary that a Federal question be presented for decision to the highest State Court having jurisdiction and that the decision of the said court held that the Federal Statute involved was invalid. Honeyman v. Hanan, 302 U. S. 375 (1937). Hulbert v. Chicago, 202 U. S. 275 (1906). Oxley Stave Co. v. Butler County, 166 U. S. 648, 655 (1897). Kipley v. Illinois, 170 U. S. 182, 186 (1898). Chicago and N. W. Railway Company v. Chica-

go, 164 U. S. 454, 457, (1896). Michigan Sugar Company v. Michigan, 185 U. S. 112, 113 (1902). N. Y. Central Railroad Company v. N .Y., 186 U. S. 269, 273 (1902).

In the case of Capital City Dairy Company v. Ohio, 183 U. S. 238, 248 (1902), the court therein held that it is well settled that this court on error to a State Court, cannot consider an alleged Federal question, when it appears that the Federal right thus relied upon had not been, by adequate specification, called to the attention of the State Court and had not been by it considered, not being necessarily involved in the determination of the cause.

In the case of Nutt vs. Knut, (1905) 200 U. S. 12 (1906) cited by the petitioners in their brief, the State Court in that case specifically adjudged that the contract involved therein was not, on its face, in violation of the Statutes of the United States.

This situation did not prevail in the instant case.

Had the appeal been properly taken and had the petitioners in the trial court made the proper written Request to Charge, it would then have been the duty of the Supreme Court of New Jersey to pass upon the questions presented, perhaps including a Federal question. In legal effect, this case stands as though no appeal had been presented involving a Federal question. The jurisdiction of this court to review the judgments of the State Courts, when a Federal question is presented, is limited to the review of a final judgment or decree, actually or constructively deciding such question. Where, for lack of the proper procedural steps, no final judgment is actually rendered deciding the Federal question, it results that the requisite for the exercise in this case of the reviewing power of this court is missing. Newman v. Gates, 204 U. S. 89 (1907).

No right or immunity under a Statute of the United States was decided by the Supreme Court of New Jersey.

The first time the petitioners claim a right or immunity under a Statute of the United States is in their Brief filed on behalf of the Writ of Certiorari in this Court. Nowheres in the record of the case showing the proceedings in the trial court nor in the grounds of appeal nor in the decision of the Supreme Court of the State of New Jersey is there any mention made of a right or immunity under a Statute of the United States. In order to give this court jurisdiction to review a decision of the Supreme Court of New Jersey under the claim that a right or immunity arose out of a Statute of the United States, it must appear on the record that such right or immunity was specifically set up or claimed at the proper time and in the proper place. Spies vs. Illinois, 123 U. S. 131, 181 (1887). Chicago & N. W. Railway Co. v. Chicago, *supra*.

The fact that the opinion of the State Court makes no reference to the particular question sought to be presented in this court may be considered in determining whether the question was called to the attention of the State Court. Hulbert v. Chicago, *supra*.

Local questions only were decided by the Supreme Court of New Jersey.

As has been pointed out previously when the petitioners appealed to the Supreme court of New Jersey, their appeal was based upon the grounds of appeal filed with that court. These grounds of appeal simply alleged that the trial court had committed certain trial errors; its refusal to nonsuit, its admission of evidence and its failure to charge the Wage Stabilization Act. All of these matters dealt with

practice and pleading as administered by the State Courts of New Jersey and the opinion of the Supreme Court of New Jersey simply held that the trial court had not committed any errors in the matters set up by the petitioners as their grounds of appeal. This court in reviewing a judgment of the State Court will not decide local questions. United Gas Co. v. Texas, 303 U. S. 123, 139 (1938). John v. Paullin, 231 U. S. 583, 585 (1913). Lee v. Central of Georgia Railway Co., 252 U. S. 109, 110 (1920). Central Union Co. v. Edwardsville, 269 U. S. 190, 194, 195 (1925).

There is no doubt but that it rests with each state to prescribe the jurisdiction of its Appellate Courts, the mode and time of invoking that jurisdiction, the rules of practice to be applied in its exercise, and the State law and practice in this regard are no less applicable where Federal rights are in controversy then when the case turns entirely upon questions of local or general law. Callan v. Bransford, 139 U. S. 197 (1891). Jacobi v. Alabama, 187 U. S. 133, (1902). Newman v. Gates, 204 U. S. 89 (1907). Chesapeake & Ohio Railway Co. v. McDonald, 214 U. S. 191, 195 (1909).

Matters of pleadings and practice relate solely to the form of the remedy. When they arise in State Courts, the final determination of such matters ordinarily rest with the State tribunals, even if the rights there being enforced are created by Federal law.

The Federal Statutes and Regulations relied upon by the petitioners herein were not applicable to the facts as developed at the trial.

The Federal Statutes, Executive Orders and cases referred to by the petitioners deal with a situation where an increase in salary is involved. The claim for compensation

made by the respondent did not deal with such an increase in salary. His claim for compensation arose out of a newly created position (R. 52A, R. 55A). This was admitted by the petitioners (R. 34A). By virtue of the authority of the Federal Statutes and Executive Orders cited by the defendants, the Stabilization Director passed a regulation to be found in 7 Fed. Reg. 10050 T. D. 5186, and the pertinent section dealing with newly created positions reads as follows:

> "An employer who has established a new job classification, or who has begun business after October 3, 1942, must obtain approval of the Commissioner for the payment of salaries for such job classification or in such new business: Provided, however, that if the salary rates in question are not in excess of those prevailing for similar job classification within the local area, the approval of the Commissioner is not required."

From a reading of the section of the Stabilization Act above quoted, it is apparent that if the plaintiff came within the exception set forth in that act, then there was no need for securing the Commissioner's approval.

The exact point and issue has been decided in the case of Thacker v. American Foundry, 177 Pac. (2) 322, 1947, which was an appeal from the Superior Court of Los Angeles County to the District Court of Appeals of the Second District of California. The court, on page 322, held:

> "The first question presented for decision is, assuming that the parties entered into a contract upon the terms alleged in the complaint and found by the trial court, was such contract illegal and void as violative of the Salary Stabilization Act of 1942 in that the compensation therein provided to be paid plaintiff by the defendants was not approved by the Commissioner of Internal Revenue of the United States? The answer to this query is in the negative."

Apparently in that case the very same defense was advanced on behalf of the defendant as was in our instant case. The further question, as who has the burden of proving whether the exception provided for in the act existed was also presented. In passing upon this latter question the court, on page 325, said:

> "In pressing this affirmative defense defendants have overlooked an exception to the regulation which it is their duty to negative, by competent evidence, before such defense may become available to them. Concededly the position * * * to which plaintiff was appointed by defendants constituted 'a new job classification'. * * * The approval of the commissioner is not required under the provisions of the regulation to these classes of jobs if the salary rate provided for it is not in excess of the minimum of those prevailing in similar, job classifications within defendants' own organization or if no such rates are available, then those within the local area on September 15, 1942. The record is silent as to any such evidence and the exception has not been negatived. Under such conditions the trial judge was justified in believing the terms of the plaintiff's employment were in consonance with the minimum of those holding similar positions, if any, in defendants' business organization * * * such being the case the approval of the commissioner was not required as a prerequisite to defendants' obligation to pay the amount found by the evidence to be due plaintiff as compensation for his services so rendered."

It might be well to note that the cases cited on behalf of the petitioners namely, Wernhardt v. Koenig, 60 F. Sup. 709 (1945) and Kells v. Boutross, 53 N. Y. S. 2nd 734 (1945) were also cited to the court in the Thacker Case. The court in the Thacker case said:

> "An examination of these cases, however, reveals that the employees there before the court were neither occupying a position which had been established by the employers as a new job classification nor in a new business. As a consequence the above mentioned exception to the regulations did not apply to them as it here does to plaintiff."

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for Writ of Certiorari should be denied.

LIONEL P. KRISTELLER,
DULTZ, MILLER, GELFOND & ZELLER,
HERMAN E. DULTZ,
Counsel for Respondent.

Appendix.

GROUNDS OF APPEAL filed by the Appellants to the New Jersey Court of Errors and Appeals. (Now, New Jersey Supreme Court).

Sirs:

TAKE NOTICE, that the following are the Grounds of Appeal which the Defendants-Appellants hereby assign and upon which they will rely at the hearing:

1. The Trial Court admitted in evidence, over the objection of defendants, the letter dated August 10, 1947, Exhibit P-6.

2. The Trial Court refused to non-suit the plaintiff.

3. The Trial Court, over the objection of the defendants, permitted the witness, Charles H. Smith, to answer the following questions:

> "Will you tell the jury the prevailing rates that the engineers doing similar types of work as that testified to by Mr. Daley were receiving during the years beginning December 18, 1944, or thereabouts, during the years 1945 and 1946.—I don't think we need 1947—what were the prevailing rates in that area?"

4. The Trial Court failed to charge the jury upon the applicability of the United States Stabilization Act (U. S. C. A. 50:961 etc.) and the rules, regulations and decisions promulgated pursuant to the authority of such act.

MILTON T. LASHER,
Attorney for and of Counsel with Defendants-Appellants.

Dated: August 30, 1948.